U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 April 2006

Case Nos.: 2005-LHC-572
2005-LHC-2274

OWCP Nos.: 07-159859
07-175062

IN THE MATTER OF

JEFF BOCKMAN,
Claimant

vs.

PATTON-TULLY TRANSPORTATION COMPANY,
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier

APPEARANCES:

MARK ZIMMERMAN, ESQ.,
On Behalf of the Claimant

JOHN C. ELLIOTT, ESQ.,
RYAN M. PERDUE, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act[1] (the Act), brought by Jeffrey Bockman (Claimant) against Patton-Tully Transportation Company (Employer) and Liberty Mutual Insurance Company (Carrier).

[1] 33 U.S.C. § 901 *et seq*.

The matter was referred to the Office of Administrative Law Judges for a formal hearing and initially set for an 11 Jul 05 hearing. In the course of pre-hearing motions, Employer/Carrier sought a summary decision dismissing the case based on Claimant settling an associated claim against a third party without obtaining prior written approval.[2] I denied the motion for summary judgment, but also determined that the interests of judicial economy would be served by bifurcating the hearing and addressing the Section 33(g) issue first. Following extensive delays in the wake of Hurricane Katrina, the hearing was held on 21 Dec 05. All parties were represented by counsel and afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant
Becky Combs
Rudie Soileau
Rob Lynch

Exhibits
Claimant's Exhibits (CX) 1-5
Employer/Carrier's Exhibits (EX) 1-47

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

STIPULATIONS[4]

1. There is jurisdiction and coverage under the Act.

2. If there was an injury as alleged, it occurred within the course and scope of employment

3. There was an employee/employer relationship between Claimant and Patton-Tully Salvage Services at the time of the accident.

4. Employer was properly notified of Claimant's injury.

5. There was proper and timely controversion.

6. The value of any possible claim under the Act was not less than $28,450.33.

[2] See 33 U.S.C. §933(g).
[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Tr. 7-8.

FACTUAL SYNOPSIS

The very basic facts of the case are relatively straightforward. On 3 Apr 01, Claimant was on board the M/V YOCONA and fell going down the steps to the engine room. Initially, Employer/Carrier provided benefits under the Act, but stopped when Claimant filed a Jones Act[5] action in Mississippi state court. Eventually, the Jones Act case was dismissed as part of a settlement addressing the pending Jones Act and any potential Section 905(b)[6] claims. Employer resumed providing benefits for a period of time before it once again discontinued those benefits.

The major participants in this case are:

Jeffrey Bockman	Claimant
Patton-Tully	Commercial Entity or Entities which employed Claimant
Center Marine Managers	Patton-Tully's P&I Carrier
Liberty Mutual	Patton-Tully's Longshore Carrier
Rudy Soileau	Claimant's Attorney on the Jones Act case
Earnest Lane	Patton-Tully's Attorney on the Jones Act case
John Elliott	Patton-Tully and Liberty Mutual's Attorney on the Longshore Case
Mark Zimmerman	Claimant's Attorney on the Longshore Case

ISSUES

For the limited purpose of this portion of the bifurcated hearing, the sole issue is whether Claimant was required, but failed, to comply with Section 933(g) and consequently forfeited his right to compensation from Employer.

POSITIONS OF THE PARTIES

Claimant maintains that a signed LS-33 approval form was not required by the Act because an attorney acting on behalf of both Employer and Carrier signed a settlement document that settled Jones Act and Section 905(b) claims, but specifically reserved Claimant's longshore rights against them. Claimant also suggests that Carrier played a part in the settlement negotiations and consented to the settlement. Their participation and approval in the settlement itself obviates the need for a LS-33. Moreover, since Claimant reserved his longshore rights, the settlement by definition was not for an amount less than he could recover under the Act. Claimant additionally argues that the settlement was in effect only with Employer and there was no third-party as required by Section 33(g).

Employer responds that Claimant in fact settled with and released parties other than Employer and that Carrier was not involved in the negotiations and did not approve the settlement.

[5] 46 U.S.C. §761.
[6] 33 U.S.C. §905(b).

Law

Section 33(g) & 3rd Party

Employees injured under the Act who may also have a cause of action against a third-party as a consequence of the same injury are not required to choose one remedy over another.

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.[7]

Whether or not a third-party is liable in damages or a third-party suit settled by an employee was meritorious is beyond the scope of the administrative law judge's authority and he or she is not required to look beyond the pleadings and the result.[8]

In the case of injuries caused by the negligence of a vessel, the vessel itself qualifies as a third person and a covered employee may seek damages against it in accordance with Section 33.[9] That applies even if the owner of the vessel is the employer.[10] In that case, the employer is considered a third-party.[11]

However, if the employee exercises the right to seek damages from a third-party, the Act protects the derivative rights of the employer and carrier.

> **(1)** If the person entitled to compensation … enters into a settlement with a third person … for an amount less than the compensation to which the person … would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation …. The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

[7] 33 U.S.C. § 933(a).
[8] *Marmillion v. A.M.E. Temp Svcs.*, BRB No. 05-0543 (Mar. 23, 2006) (unpublished).
[9] 33 U.S.C. § 905(b).
[10] *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).
[11] *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 303 (3rd Cir. 1995) (applying §933(f)).

> **(2)** If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.[12]

The failure to obtain the required approval does not void *ab initio* the settlement agreement.[13] The language of Section 33(g) has been strictly interpreted and applied to employees notwithstanding harsh results. It requires prior approval even if, at the time the employee settles with a third-party, the employer is neither paying compensation to the worker nor subject to an order to pay under the Act.[14] It applies even when the employer/carrier has contracted with the third-party to waive their subrogation rights to recover benefits already paid.[15] The employer/carrier's right to set-off the amount of the settlement against future payments is independent of the right to subrogation.[16]

In a case where the claimant settles a negligence action against multiple third-party defendants, including the employer as one of the third-party defendants, the employer's involvement and signature on the settlement may be sufficient to partially comply with the Section 33(g) requirement.[17] However, even that will not satisfy Section 33(g) in its entirety if the carrier's written approval is not obtained, particularly if the longshore carrier is not the carrier on the third-party action.[18]

The employer/carrier bears the burden of proof under Section 33.[19]

Corporate Veil

Under Mississippi law, two or more corporations are ordinarily separate and distinct entities even though the same individuals are the incorporators of, or own stock, in the several corporations, and although such corporations may have the same persons as officers. A corporation may retain its separate identity where its stock is owned partly or entirely by another corporation.[20]

Mississippi law discourages piercing the veil of a subsidiary in order to deal with its parent corporation. Absent fraud, the fact that one corporation is the sole owner of another is insufficient to disregard their separate status. That is true even if the corporations share common

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[12] 33 U.S.C. § 933 (g)
[13] *Rogers v. Trico Marine Assets, Inc.*, 969 F.Supp. 384, 389 (E.D. La. 1997) *affirmed,* 165 F.3d 24 (5th Cir.1998).
[14] *Estate of Cowart v. Nicklos Drilling Co.* 505 U.S. 469, 471 (1992).
[15] *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 645 (5th Cir. 1986).
[16] *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 246 (5th Cir. 1988).
[17] *Deville v. Oilfield Industries*, 26 BRBS 123 (1992); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997).
[18] *Mapp v. Transocean Offshore USA Inc.*, 38 BRBS 43 (2004).
[19] *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 973 (4th Cir. 1992).
[20] *Murdock Acceptance Corp. v. Adcox*, 138 So.2d 890 (Miss. 1962).

management and direction. Similarly, the fact that two corporations share identical ownership does not justify disregarding their separate status. Unless one corporation is a mere instrumentality, agency, adjunct, or sham, or is used in fraud by the other corporation, the distinction should not be disregarded. [21]

While corporate stockholders may not avail themselves of the corporate structures of separate corporations when their interests are served and discard them when they become inconvenient, the corporate veil should be pierced only to avoid fraud or the defeat of public or private rights.[22]

Because the cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders, sole ownership of a corporation by another corporation is not a factor. Nor is the fact that the sole owner uses and controls it to promote his ends a factor.[23] To cause a court to disregard the corporate entity, the complaining party must demonstrate: (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder.[24]

Estoppel

The doctrine of equitable estoppel prevents one party from taking a position inconsistent with the position it took in an earlier action, such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position.[25] Estoppel applies if: (1) the party to be estopped knew the facts; (2) that party intended that its conduct would be relied upon by the party asserting the estoppel (or the party asserting the estoppel has a right to believe it was so intended); (3) the party asserting estoppel was ignorant of the facts; and (4) suffered detrimental reliance.[26]

However, equitable considerations generally are not applicable to the Section 33(g) inquiry.[27] Section "933(g)(1) is brutally direct: . . . As if the language of § 933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in § 933(g)(2), so that the two provisions frame an unmistakable scheme: . . . [T]he legislative history of the 1984 amendments to LHWCA admits no exception to the written approval requirement . . ."[28]

[21] *Johnson & Higgins of Mississippi, Inc. v. Commissioner of Ins. of Mississippi*, 321 So.2d 281, 285 (Miss. 1975).
[22] *St. Paul Fire and Marine Ins. Co. v. Vest Transp. Co., Inc.*, 666 F.2d 932, 939 (5th Cir. 1982).
[23] *Gray v. Edgewater Landing, Inc.*, 541 So.2d 1044, 1047 (Miss. 1989).
[24] *Hardy v. Brock* , 826 So.2d 71, 75 (Miss. 2002).
[25] *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).
[26] *Rambo v. Director, Office of Workers' Compensation Programs,* 81 F.3d 840 (9th Cir. 1996).
[27] *Marmillion v. A.M.E. Temp Svcs.*, BRB No. 05-0543 (Mar. 23, 2006) (unpublished).
[28] *Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644, 647 (5th Cir.1986).

Evidence

The documents in the case reflect in pertinent part the following chronology:

Exhibit	Date	Document
EX-34 p. 351	13 Apr 01	Liberty Mutual filed a LS-206 reporting that payment to Claimant started on 3 Apr 01. It named Patton-Tully Transportation Company as Employer.
EX-34 p. 337	23 Apr 01	Patton-Tully Transportation, LLC sent Claimant a letter with a check from Liberty Mutual and forms to complete to continue to receive pay from Patton-Tully.
EX-7	2 Apr 02	Claimant filed a complaint in Mississippi state court against Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; and Patton-Tully Salvage Services, LLC. The complaint alleges separate locations for service of process for the three defendants. It alleges that all three defendants owned and operated the M/V YOCONA and that Claimant was a seaman covered by the Jones Act at the time of an injury aboard the YOCONA on 3 Apr 01. The complaint sought relief and damages under the Jones Act and General Maritime Law.
EX-34 p. 328	5 Aug 02	Patton-Tully Transportation, LLC sent Claimant a letter informing him his employment with Patton-Tully Transportation, LLC was terminated effective 1 Aug 02, but that he should have been terminated on 31 Mar 01, when his division was sold.
EX-9	8 Aug 02	In response to Claimant's interrogatories, the defendants denied that defendants Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; and Patton-Tully Salvage Services, LLC owned and operated the YOCONA, but admitted that Patton-Tully Transportation, LLC was its owner *pro hac vice*. Defendants denied that Claimant was a Jones Act seaman employed by Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; and Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; and Patton-Tully Salvage Services, LLC, but admitted that Claimant was employed by Patton-Tully Salvage Services, LLC.
EX-3	6 Sep 02	Liberty Mutual filed a LS-207 reporting it was controverting Claimant's right to compensation because of his allegations in the Jones Act. It named Patton-Tully Transport as his employer.

EX-11	25 Nov 02	Mr. Soileau sent Mr. Lane a letter outlining the proposed settlement for Claimant's litigation. The letter asks Mr. Lane to review and sign an enclosed settlement agreement or call to discuss any objections. The letter acknowledges that Patton-Tully considers resolution of the Vines case to depend on resolution of Claimant's case. The letter proposes that Patton-Tully will pay $50,000 and guarantee payment of the attached medical expense while Claimant would dismiss the Jones Act case with prejudice. Mr. Soileau notes in the letter that the claim is properly asserted under the Longshore Act because Jones Act status does not likely exist. The letter states that after dismissal of the Jones Act case, the claim would be administered by Liberty Mutual in the same fashion demonstrated prior to the initiation of the Jones Act claim and as if it had not been filed, including but not limited to the payment of benefits to Claimant, as well as medical benefits by Liberty Mutual under the Longshore Act. The letter specifically notes that submission of the listed medical expenses to Liberty Mutual is a condition and that Liberty Mutual will pay those expenses in the absence of a separate formal determination that they have already been paid or are not owed under the Act.
EX-17	25 Nov 02	Mr. Lane sent a letter to Mr. Soileau in response to his letter of that same date. Mr. Lane states that he does not represent Liberty Mutual and has no control over its payment or approval of medical expenses. He states he can only promise that Patton-Tully will submit the medical expenses to Liberty Mutual with the understanding that Claimant is covered by the Longshore Act and request that Liberty Mutual reinstate Longshore benefits. He states that Patton-Tully and its P&I insurer strongly believe Claimant is not a Jones Act seaman, but are willing to pay $50,000 in settlement of the Jones Act case to terminate the litigation and avoid potential liability if they are wrong.
EX-16	26 Nov 02	Mr. Soileau sent a letter to Claimant stating that he had reached a tentative agreement to conclude the Jones Act case. The agreement would provide Claimant only a very limited amount of money, but Claimant's right to benefits under the Longshore Act would not be limited.
EX-11	2 Dec 02	In a response to Mr. Lane's 25 Nov 02 letter, Mr. Soileau stated he understood that Mr. Lane did not represent the Longshore carrier, Liberty Mutual, and withdrew his demand for a hold harmless obligation by Patton-Tully. He restated that in exchange for $50,000 and the mutual agreement on the Longshore claim as previously discussed, Claimant would join in a consent judgment based on a lack of jurisdiction, stating the common understanding.
EX-16	8 Dec 02	Mr. Soileau sent a letter to Claimant asking him to review enclosed motions to dismiss and consent order.
EX-43	5 Dec 02	A check for $50,000 payable to Claimant and Mr. Soileau was drawn on Patton-Tully Transportation Company's account.

EX-17	13 Dec 02	Mr. Lane sent Mr. Soileau a letter notifying him that Mr. Lane had received the $50,000 check from Patton-Tully and Patton-Tully's share of the Vines settlement. He enclosed a rough draft of a release and asked Mr. Soileau to review the release, the motion to dismiss, and the consent order.
EX-12	19 Dec 02	Mr. Soileau sent Mr. Lane an e-mail stating that he was reviewing the release documents and had become concerned about the applicability of 33 USC § 933, requiring approval of third party claims. Mr. Soileau stated that his first reaction was that there was no third-party claim, since it was the same employer and only a selection of remedy, but he was having some doubts. Mr. Soileau asked Mr. Lane for his thoughts on whether the agreement between Patton-Tully and Claimant was a third-party claim and whether Patton-Tully's participation satisfied notice requirements, such that no prior notice to Liberty Mutual was necessary. Mr. Soileau expressed concern about the 905(b) release language included by Mr. Lane.
		Mr. Lane responded to Mr. Soileau's concerns by sending him an e-mail with the address for Liberty Mutual's adjuster.
EX-17	6 Jan 03	An agreed order of dismissal was issued in state court, finding that Claimant was not a seaman and could not proceed under the Jones Act or general maritime law, but had an exclusive remedy under the Longshore Act.
EX-17	7 Jan 03	Mr. Lane sent Mr. Soileau a letter notifying him that the dismissal order had been signed and that the $50,000 would be deposited in the trust account.
EX-13	8 Jan 03	Mr. Soileau sent Liberty Mutual a letter enclosing a copy of the state court dismissal. Mr. Soileau stated that his representation of Claimant was terminated and that subsequent proceedings would be administered through the Longshore Act. Mr. Soileau also enclosed a Longshore Claim form and asked Liberty Mutual to reinstate benefits and medical care.
EX-3	16 Jan 03	Liberty Mutual filed a LS-207, reporting that it was controverting Claimant's right to compensation based on disputed date of injury, accident description, and average weekly wage. It named Patton-Tully Transportation as employer.

EX-13	5 Feb 03	Mr. Soileau faxed to Liberty Mutual's adjuster a letter stating he previously represented Claimant in a state court case that was dismissed. Mr. Soileau stated that Patton-Tully asked Claimant to sign a release regarding any 905(b) claim and that since Mr. Soileau did not believe there was any basis for such a claim, he did not object. Mr. Soileau also stated that Patton-Tully was willing to pay $50,000 for the release. Those funds were allocated to legal fees and expenses incurred on the state court litigation, with an estimated balance of $20,000 to Claimant. Mr. Soileau stated he did not believe this was a third-party settlement requiring Liberty Mutual's approval, but was notifying Liberty Mutual and giving it an opportunity to inquire further and confirm it had no objection. Mr. Soileau stated that the agreement was simply designed to allow the matter to proceed under the Longshore Act and he did not intend to do anything to impair Claimant's longshore rights. Mr. Soileau asked Liberty Mutual to notify him if it had any objection or needed more information. Mr. Soileau informed Liberty Mutual that in the absence of any objection, he intended to conclude the matter by 15 Feb 03.
EX-11	5 Feb 03	Mr. Soileau sent Mr. Lane a letter enclosing a copy of a letter sent to Liberty Mutual. Mr. Soileau stated that he hoped to conclude the matter shortly and asked Mr. Lane to notify him if he had any information suggesting an objection or any other complications concerning the longshore claim.
		Mr. Soileau sent Mr. Lane an e-mail enclosing a letter to Liberty Mutual and stating that all was going as expected with the hope of wrapping it up shortly.
		Mr. Lane replied via e-mail that he had had no contact with Liberty Mutual and that Patton-Tully had not notified him of any contact it had with Liberty Mutual.
EX-14	17 Feb 03	Mr. Soileau faxed a letter and LS-33 to Liberty Mutual. The letter stated the LS-33 was consistent with his previous letter. He also stated that while he believed section 33(g) did not apply and that the LS-33 was not necessary, the minimal nature of the money involved compared to the longshore benefits made him reluctant to proceed without it. He asked Liberty Mutual to review and execute the form.
EX-11	17 Feb 03	Mr. Soileau sent Mr. Lane an e-mail attaching a letter he had faxed that day to Liberty Mutual. Mr. Soileau stated Liberty Mutual had not objected to his most recent letter, but observed that there had been a bit of an issue over something that apparently was a clerical error. Nonetheless, Mr. Soileau said he had an uneasy feeling because the release funds were so insignificant compared to the longshore benefits. Because of that, he decided to send a LS-33 to Liberty Mutual and attached a copy for Mr. Lane. He told Mr. Lane that if Liberty Mutual executed and returned the LS-33, he would immediately forward the release so the trust funds could be delivered. He asked Mr. Lane to execute the LS-33 on behalf of Patton-Tully.
		Mr. Lane replied via e-mail, asking Mr. Soileau to resend the LS-33 and informing him that he had received a call the week before from Liberty Mutual's attorney. Mr. Lane related that the Liberty Mutual attorney was

		comfortable with the procedure, did not think there would be any problem, thought Liberty Mutual was providing benefits to Claimant, and asked that a copy of the release be sent to him.
		Mr. Soileau replied via e-mail that he would fax a LS-33 and that he was sorry to be a "sissy" about the matter, but was worried about stepping into a bog hole. He asked Mr. Lane to help secure a signed LS-33 from Liberty Mutual.
		Mr. Lane replied via e-mail that he could sign for Patton-Tully, but suggested that Mr. Soileau call John Elliot directly,[29] since Liberty Mutual would get his opinion first and he understood what they were doing.
		Mr. Soileau acknowledged Mr. Lane's e-mail and said he would follow the suggestion.
EX-17	25 Apr 03	Mr. Lane sent Mr. Soileau a letter stating he would like to close his file on Claimant and asking for the release.
EX-14	14 May 03	Mr. Soileau sent a letter notifying Mr. Elliott that Claimant was interested in a lump sum resolution of future longshore claims and had retained an attorney for that purpose. Mr. Soileau also stated that as generally agreed, he was going forward with the conclusion of the proceedings with Patton-Tully. Mr. Soileau stated he understood Liberty Mutual preferred to hold execution of any legal documents until an agreement on the longshore benefits was reached, but also understood that there was no objection to the steps previously discussed to conclude the Patton-Tully part of the matter.
EX-11	14 May 03	Mr. Soileau sent Mr. Lane a letter, enclosing a copy of the letter he sent to Mr. Elliott, stating that Mr. Soileau was ready to conclude Claimant's case against Patton-Tully, and reserving the longshore claim. Mr. Soileau also enclosed a release signed by Claimant and asked that a check for the funds in trust be sent to Mr. Soileau.
EX-19	16 May 03	Claimant signed a release and acknowledgement. For consideration, Claimant released Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; Patton-Tully Salvage Services, LLC; its protection and indemnity underwriters, including The Center Marine Managers, Inc.; and the M/V YOCONA from Jones Act, general maritime law, Section 905(b), and Disability Act claims. Claimant acknowledged he was not a seaman and could not maintain a claim against or sue his employer or any affiliated company in either state or federal court. Claimant acknowledged he was a maritime worker covered by the Longshore Act and reserved and accepted from the release any rights he had under the Longshore Act against Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; Patton-Tully Salvage Services, LLC; and its longshore carrier. Notwithstanding, Claimant released any §905(b) claim. Claimant directed his attorney to dismiss the state lawsuit.
		Mr. Soileau sent Mr. Lane a letter enclosing the release.

[29] Mr. Elliot served as Employer/Carrier's counsel in this litigation.

EX-23	19 May 03	Mr. Elliott sent Mr. Soileau a letter apologizing for the delay and informing Mr. Soileau that Liberty Mutual did not approve of any settlement under Section 33(g). Mr. Elliott asked to be notified when the settlement with Patton-Tully was concluded.
EX-21	20 May 03	Mr. Lane sent Mr. Soileau a check for $50,000.
EX-18	30 May 03	Mr. Soileau sent Mr. Zimmerman a letter stating that Mr. Soileau was satisfied that they should continue to attempt to settle Claimant's longshore claim instead of waiting for Claimant to recover from surgery. Mr. Soileau said the funds from Patton-Tully were still in trust, but enclosed $1,500 for Mr. Zimmerman, with the understanding that Mr. Zimmerman would receive most of his fee from Liberty Mutual's payment of the longshore claim.
EX-42	2 Feb 04	Mr. Soileau issued a check to Claimant for $28,450.33.
EX-22	4 Feb 04	Claimant signed a disbursement statement for the state court showing he received $28,450.33 of the $50,000, with the balance to legal fees and costs.
EX-44	19 Aug 04	Liberty Mutual provided a LS-202 stating it was terminating benefits because Claimant had entered into a third-party settlement without its consent. It named Patton-Tully Transportation Company as employer.
EX-3	20 Aug 04	Liberty Mutual provided a LS-207 reporting that it was controverting Claimant's right to compensation based on nature and extent of injury and section 33(g) and (f). It named Patton-Tully Transportation Company as employer.

Pay records reflect:[30]

Claimant was on the payroll of Patton-Tully Salvage Services, LLC.

The P&I carrier's contract shows:[31]

The assured was Anderson-Tully Management Services, LLC.

The Longshore carrier's contract shows:[32]

The assured was Anderson-Tully Management Services, LLC.

Answers to interrogatories in Mississippi state court reflect:[33]

Patton-Tully Salvage Services, LLC is no longer in business and its assets were sold on or about 29 May 01. Patton-Tully Transportation Company is no longer in existence and was not in existence at the time of Claimant's injury.

[30] EX-25.
[31] EX-26
[32] CX-5.
[33] EX-9.

Liberty Mutual's LS-208 of 19 Aug 04 reflects:[34]

> Liberty Mutual paid Claimant benefits for the period 3 Apr 01 to 16 Aug 04.

The company formation agreement of Patton-Tully Salvage Services, LLC's reflects:[35]

> It was created on 30 Jun 98 in Mississippi with a principal place of business at 2200 Levee Street, Vicksburg. Its registered office was at 127 South Poplar Street, Greenville and its agent was Lake Tindall, LLP. It was 100% owned by Patton-Tully Transportation, LLC.

A contract between Patton-Tully Salvage Services, LLC's and Patton-Tully Transportation, LLC reflects:[36]

> The two entities entered into a contract on 30 Jun 98. Patton-Tully Transportation, LLC, contributed marine salvage assets to Patton-Tully Salvage Services, LLC and assumed all related rights and liabilities. The president of both entities was Charles Rodgers.

The company formation agreement of Patton-Tully Transportation, LLC's reflects:[37]

> It was created on 31 Dec 97 in Mississippi with a principal place of business and registered office at 1735 North Washington, Vicksburg. Its agent was Joe Coccaro. It was 100% owned by Anderson-Tully Veneers, LP.

A contract between Patton-Tully Transportation, LLC and Anderson-Tully Veneers, LP reflects:[38]

> The two entities entered into a contract on 31 Dec 97. Anderson-Tully Veneers, LP, contributed marine salvage assets to Patton-Tully Transportation, LLC and assumed all related rights and liabilities. The president of Anderson-Tully Veneers was Parnell Lewis and the president of Patton-Tully Transportation, LLC, was Charles Rodgers.

Claimant testified in relevant part as follows:[39]

> At the time of his injury, on 3 Apr 01, he had been working for Patton-Tully for about twelve years. He did whatever they needed and worked as a mechanic, welder, and crane operator. He was directly under the Salvage division of Patton-Tully, but regularly did work for other parts of Patton-Tully. There were other companies called Patton-Tully

[34] EX-44.
[35] EX-27.
[36] EX-28.
[37] EX-31.
[38] EX-32.
[39] Tr. 71-96.

Transportation and Patton-Tully Salvage. For Salvage Services, he went out on the river and raised whatever they were sent to raise. Salvage Services had the separate business of salvaging sunk boats, barges, high-line towers, or anything else in the Mississippi River, primarily using an A-frame barge, which belonged to Salvage Services.

There was another separate Patton-Tully company out of Memphis that moved rock and had a boat called the BART TULLY. There was also another Patton-Tully corporation separate from the rock company and the salvage company. It drove pilings and built docks.

Sometimes Claimant worked on a rock barge, fixed drag lines, or went to the rock yard in Vicksburg or Memphis and unloaded rocks. Those jobs were not under the direct supervision of the Salvage Services Division of Patton-Tully, but were all part of Patton-Tully.

He was first a mechanic and then promoted to foreman. At the time of his injury, he primarily worked out of the Vicksburg location for Patton-Tully Salvage Services, which was located at 2200 Levee Street. Salvage Services was his employer and his supervisor was Mr. Wayne McDaniel, who also worked for Salvage Services. He was injured on the vessel YOCONA. It was not owned by Salvage Services, but did have "P-T-T" on its stack and was owned by a Patton Tully company. Salvage Services owned one boat, the ROSA LOWERY.

Patton-Tully Salvage Services was sold after his accident. It was sold to a company called J.O. Smith Towing Company. All the Salvage equipment and dock belonging to Salvage in Vicksburg is now gone. The A-frame barges were sold to J.O. Smith Towing.

He had a weekly wage of $927.00. Since the 2001 accident, he has had several surgeries. He has not returned to work for Patton-Tully Salvage Services and believes he is entitled to compensation from the date of his injury to present.

Claimant received a check from Rudie Soileau for the third-party action.[40] It is the amount that he received after Mr. Soileau took his portion out for fees. It is the only money he received from Mr. Soileau. It is less than what he claims as entitlement to compensation in this longshore claim.

He remembers filing a Jones Act case with Rudie Soileau as his attorney around February 2002. He also believes that his longshore compensation benefits were suspended or cut off about September 2002. He understood that they settled his Jones Act and 905(b) actions because he was not a Jones Act seaman and Employer would give him $50,000 and restart his benefits.

[40] EX-42.

Claimant signed a release, releasing Patton-Tully Transportation Company, Patton-Tully Salvage Services, Patton-Tully Transportation, LLC, the Center for Marine Managers, and the vessel YOCONA, in exchange for the money he received.[41] He was under the impression Mr. Soileau had taken care of getting approval of the settlement.

He had some unpaid medical expenses prior to the dismissal of the Jones Act case in January 2003. They were paid after the dismissal. He had back surgery around May 2003, which was also paid for.

Becky Combs testified in relevant part as follows:[42]

She has worked for Carrier for 38 years and has seen many longshore claims. She is the claims adjuster in Claimant's case. She took the case in May 2005 from Cindy McDonald. She did not work on the claim until then and her knowledge of what happened before is based on a review of the file.

Carrier began to pay longshore benefits to Claimant following the incident on 3 Apr 01. It stopped the benefits on 30 Aug 02 as a result of the Jones Act suit. On 25 Nov 02 Mr. Lane sent a letter to Mr. Soileau suggesting the payment of $50,000 in consideration of a dismissal with prejudice of the Jones Act, and a request for Carrier to reinstate the longshore benefits to Claimant.[43] Carrier resumed paying longshore benefits to Claimant on 20 Jan 03.

At the time, Carrier was not aware that the Jones Act case had been settled. There is nothing in the file to indicate that Carrier's intent was contrary to the provision in the release agreement that Claimant reserved his rights to longshore benefits.

Notwithstanding the absence of a specific objection in the letter[44] written from Carrier's representative three days after the signed release, Carrier did not agree to the settlement. Even though it never said so in so many words, Carrier did not agree because the $50,000 settlement amount was less than it had already paid Claimant in compensation. Carrier continued to pay Claimant longshore benefits until 8 Aug 04, when it stopped payments based on a Section 33(g) defense.

Some of the defenses that Carrier would want to assert in this claim, just like in many others, include maximum medical improvement, nature and extent of injury, and ability to return to work. Carrier continued to pay benefits even though there was a 33(g) defense because Claimant had not recovered from the injury and surgeries. Carrier was trying to continue discovery on its defenses to terminate benefits. It wanted Claimant at

[41] EX-19.
[42] Tr. 34-68.
[43] EX-17.
[44] EX-23.

maximum medical improvement so that he could return to work. It was looking at nature and extent of injury and the third party settlement. She understood that the penalty if a claimant files a third-party suit and settles the third-party suit without getting the employer and the insurer to sign off on a LS-33 approval form, is that he forfeits his benefits.

Carrier never signed a LS-33 or any other writing approving of the settlement. It never verbally expressed any approval of this settlement. Carrier did not provide the protection and indemnity (P&I) coverage over the Jones Act lawsuit or the attorney that was retained in that lawsuit. It did not take part in any negotiation or pay any part of the settlement of the third-party action. It was not aware of the details of the settlement.

Carrier paid Claimant $101,571.92 in compensation benefits. Its decision to resume and continue those payments did not have anything to do with settlement of the third-party action.

She is not aware of any document showing that Anderson-Tully is not the proper name of the insured in the insurance contract between carrier and Patton-Tully.

Rob Lynch testified in relevant part as follows:[45]

He is Patton-Tully Transportation, LLC's, General Manager.

In April 2001 Claimant worked for Patton-Tully Salvage Services, LLC. It was created sometime in 1998 and its main office was in Vicksburg, Mississippi. Its business was to salvage sunken barges and boats along the Mississippi River and tributaries. The physical location for Salvage Services was in Vicksburg, Mississippi on Levee Street. Claimant reported his accident to Salvage Services.

Claimant was working for Patton-Tully before the technical creation of Patton-Tully Salvage Services. When he and other employees were not working with their particular company, they would work on other boats belonging to other entities of Patton-Tully.

The physical location of the YOCONA was Vicksburg, Mississippi.

The manager of Salvage Services and Claimant's supervisor was Wayne McDaniel. He had control over Claimant. Salvage Services had the right to discharge Claimant and the obligation to pay him. The A-frame barge that Claimant worked on was owned by Patton-Tully Salvage Services.

[45] Tr. 209-37.

Patton-Tully Salvage Services exists; however, its assets were sold to J.O. Smith or Big River Salvage in Vicksburg, Mississippi in 2002. J.O. Smith is a competitor in the harbor in Vicksburg, Mississippi. After the assets were sold, the employees of Salvage Services were told that the company was shutting down. J.O. offered several of them employment. The creation or the selling of the assets of Patton-Tully Salvage Services did not have anything to do with defrauding Claimant in his workers' compensation claim.

Patton-Tully Transportation, LLC, was created sometime in 1997. Its main office is at 1242 North Second Street in Memphis, Tennessee. It is different than Patton-Tully Salvage Services. Its general superintendent was Willard Bargery, not Wayne McDaniel, who was with Salvage Services. Patton-Tully Transportation, LLC, had separate employees from Salvage Services. Patton-Tully Transportation, LLC, was created before Claimant's 2001 injury and its formation was unrelated to Claimant's workers' compensation.

Patton-Tully Transportation Company was created in 1906 and hauled log barges up and down the river.

The corporations had separate book keeping, tax ID numbers, and tax returns. They had separate principle places of business and were created in different years. They complied with corporate formalities and had separate corporate formation documents.[46] The corporations did have written contracts between one another.[47]

Patton-Tully Transportation Co., Patton-Tully Transportation, LLC, the Center for Marine Managers and Patton-Tully Salvage Services were all separate companies. The only one that employed Claimant on the date of the accident alleged in the Jones Act law suit was Patton-Tully Salvage Services, LLC. There was protection and indemnity coverage that defended against that lawsuit, but it was not provided by Carrier. Salvage Services did not own the vessel YOCONA. It was owned either by another company called Patton-Tully Harbor Services, LLC, located in Vicksburg, or by Patton-Tully Transportation.

Patton-Tully Transportation, LLC, had a hundred percent interest in Patton-Tully Salvage Services and Anderson-Tully has a hundred percent interest in Anderson-Tully Veneers, LLC. Patton-Tully Transportation, LLC, has no ownership interest in the Center for Marine Managers. They are an underwriter for the P & I coverage agent.

The protection and indemnity insurer did not pay the $50,000 for the release and dismissal of the third-party action because it was less than the deductible. Liberty Mutual neither defended the third-party lawsuit nor had anything to do with hiring the defense counsel in that lawsuit. It did not participate in the settlement negotiations or pay any part of the money. He knows of no writing that indicates Liberty Mutual approved of the settlement.

[46] EX-27, 31.
[47] EX-28, 32.

The $50,000 settlement check was drawn on an account that was set up for all the entities of Patton-Tully. It had Patton-Tully Transportation Company as the name on it. Mr. Lane drew up a release that reserved the longshore rights against all of the defendants, including the longshore carrier. He had the authority to do that on the behalf of the three named Patton-Tully entities and the P & I carrier.

Rudy Soileau testified in relevant part as follows:[48]

He has been an attorney in Louisiana since 1983. He does not remember prosecuting a case that he thought was a 905(b) case. Since he opened his law firm, he has not handled a longshore claim and does not consider himself counsel in the prosecution of Claimant's longshore claim. Most of his practice is based on a contingency fee.

He filed suit and was counsel against Patton-Tully in a matter called Vines versus Patton-Tully Transportation, LLC. In that case, there was extensive discovery and informal investigation. The case went to trial and the jury returned a verdict of approximately $934,000. Of that amount, Mr. Soileau had a forty percent contingency fee plus expenses. He had to share some of that with local counsel.

He met Claimant through Mr. Vines and represented Claimant in another Jones Act lawsuit filed against Claimant's employer, Patton-Tully. Since the case was filed in Mississippi, which has no direct action statute, no insurer was named as a defendant. Mr. Soileau named three Patton-Tullys in the suit: Patton-Tully Salvage, Patton-Tully Transportation, and Patton-Tully Transportation Company. There was only one named defendant in the Vines case and there was some confusion into how payroll was allocated. He also discovered during the Vines litigation that the company Claimant worked for had been closed. When Claimant's suit was filed, local counsel identified three entities; all Patton-Tully companies, all operating out of the same Memphis office, and all under another entity called Anderson-Tully. Mr. Soileau agreed with local counsel's suggestion to name all three to make sure that they had the proper employer. Claimant's benefits under the Longshore Act were terminated after his Jones Act suit was filed.

There was only one defense attorney in the case, Ernest Lane. He was defense counsel in both the Vines and Claimant's lawsuits. In both cases, the Patton-Tully entities challenged seaman status. There were no depositions taken in Claimant's case. Mr. Lane never talked to Mr. Soileau about settling Claimant's case until the Vines case had been tried.

Following the Vines trial, Mr. Lane threatened to appeal the jury verdict. Mr. Lane and Mr. Soileau discussed an offer to settle both the Vines litigation and Claimant's litigation for a total of $950,000, with $900,000 allocated to Vines and $50,000 allocated to Claimant. Mr. Soileau knew in November 2002 that Patton-Tully considered closing one case contingent on closing the other. Patton-Tully wanted to know that both litigations were resolved, but it was not something on Mr. Soileau's wish list. He recommended to

[48] Tr. 97-208.

both Vines and Claimant that they accept the settlement offer. Mr. Soileau did not believe that he had a good faith basis to oppose a motion for dismissal on jurisdictional grounds in Claimant's Jones Act case.

As of 25 Nov 02, there was no dismissal order or motion to dismiss Claimant's case. Mr. Soileau's 25 Nov 02 letter[49] outlined an agreement that was emerging from his discussions with Patton-Tully. Claimant's Jones Act case was going to be dismissed and the Longshore and Harbor Workers' Compensation Act benefits would be reinstated. Claimant would be handled under and receive benefits in accordance with the Act. Claimant would also receive $50,000. Mr. Soileau also attached to the letter a list of unpaid medical expenses. There was an unresolved question as to whether Liberty Mutual would pay all of these benefits. There were different reasons why some had not been paid. So he did not know at the time, even at the dismissal, what was going to happen with all of those unpaid bills. At some point after the dismissal was signed and filed in the Jones Act case, those bills were paid by Liberty Mutual.

He understood that the agreed dismissal order acknowledged that the Jones Act claim could not proceed and would be dismissed; and that Claimant would instead be covered under the Longshore Act. As far as Mr. Soileau knows, at the time of the dismissal the only viable entity among the named defendants was Patton-Tully Transportation, LLC.

The Vines settlement and the dismissal in Claimant's case happened about the same time. Mr. Soileau received a contingency fee in Vines' settlement of 40% of $900,000. He received that money in early 2003, about the same time Claimant's Jones Act case was dismissed. Mr. Soileau shared his fee with a local counsel. He could not recall how the fee was divided.

On 08 Jan 03 Mr. Soileau wrote a letter to Liberty Mutual to let them know the Jones Act case had been dismissed and to get Claimant's longshore compensation benefits restarted.[51] At the time he wrote the letter, he was confident Liberty Mutual would restart Claimant's benefits.

When Mr. Soileau wrote the 5 Feb 03 letter[50] to Liberty Mutual, the Jones Act case had been dismissed. Mr. Lane was willing to pay fifty thousand dollars, but asked for a signed release agreement. The purpose of the letter was to outline all of this; to make sure Liberty Mutual understood what was going on and that everyone was on the same page.

The first letter sent the dismissal and addressed the status of the proceedings. The second followed-up and provided Liberty Mutual with his position. It explained exactly what was happening and why. It also invited Liberty Mutual to object or ask for additional information.

[49] EX-11.
[51] EX-13.
[50] EX-13.

Based on the 17 Feb 03 emails,[51] he believed that everyone understood and was in agreement as to what was happening. He sent a LS-33 to Liberty Mutual, but never got a signed one back. The LS-33 he sent to Liberty Mutual estimated Claimant would receive about $19,000 out of the $50,000. That figure anticipated that Mr. Soileau would withhold money to pay past medical expenses. When those expenses were paid by Liberty Mutual before Mr. Soileau disbursed the money to Claimant, the amount remaining for Claimant increased to about $28,000. Mr. Soileau specifically talked to Mr. Elliott about the $28,000 figure in terms of a credit against the longshore benefits.

Mr. Soileau took his actions because, based on his research, he did not believe that a LS-33 was necessary, since there was no third party. Mr. Soileau communicated that in his initial letters to Liberty Mutual. Mr. Soileau also said it to Mr. Lane and Mr. Elliott when they spoke on the telephone. Mr. Elliott told Mr. Soileau that Liberty Mutual did not want to do a LS-33 and appeared to agree with Mr. Soileau's position that it was not necessary because there was no third party. Mr. Elliott suggested they go forward and try to resolve the entire case. Mr. Soileau never went back to do a second LS-33 to show the $28,000 because according to Mr. Elliott there was not going to be a LS-33.

He wrote the 14 May 03 letter[52] because Mr. Elliott had become involved and Mr. Soileau wanted to confirm again for Liberty Mutual what was happening, why it was happening and what the consequences were, to make sure everyone was all on the same page. There was not going to be a LS-33 signed. At that point, Mr. Soileau and Mr. Elliot had discussed the $50,000. Mr. Elliott's concern was that if the Employer was paying Claimant $50,000 and there was no Jones Act case, since it had been dismissed, that they were entitled to a credit. Liberty Mutual wanted a lump sum settlement in the longshore case. Mr. Soileau took that suggestion to and discussed the risks with Claimant. He then went back to Mr. Elliott to pursue a settlement. Mr. Soileau had no objection to the credit. Mr. Elliott asked Mr. Soileau to submit a settlement proposal and Mr. Soileau replied that he would be retaining a lawyer that was more familiar with the Longshore Act to review the proposal.

The release and acknowledgement[53] was created because Patton-Tully wanted a piece of paper that confirmed the release of any other claims and Mr. Soileau wanted an acknowledgement that Claimant did not have seaman status, that the parties were agreeing that he properly fell under the Act, and acknowledging that those benefits would be due to Claimant under the Act. While the release took care of the 905(b), it expressly reserved his longshore rights.

He believed Patton-Tully, with Mr. Lane, had the authority to include language binding the carrier to recognize any of Claimant's rights to longshore benefits as stated in the release. Mr. Soileau understood that this was what all parties intended. That never changed through the discussions. He believed the Carrier was in the loop, not only as a result of discussions and letters, but because when he filed the Jones Act suit Claimant stopped getting benefits. Whoever the carrier was for those benefits knew about the Jones Act. When the dismissal was signed, Claimant's benefits started back up.

[51] EX-11.
[52] EX-14.
[53] EX-19.

He did not worry about the P & I carrier being different from Liberty Mutual because he got to Liberty Mutual. He made it a point to talk to them and followed up with correspondence. He disclosed everything. He talked to their adjuster and attorney for months and months to make sure everyone was on the same page. From Mr. Soileau's perspective, the P & I insurer was of no significance after the January dismissal of the Jones Act claim.

There is not one single piece of paper that says Liberty Mutual approved of the arrangement and there is certainly no signed LS-33. However, Mr. Soileau believes that the writings taken as a whole evidence an agreement.

The 17 May 03 e-mail from Mr. Lane to Mr. Soileau states, "Rudie, I received a call last week from Liberty's attorney and he was comfortable with the procedure and did not think there would be any problem."[56] In response to a letter from Mr. Soileau asking if there were problems, Mr. Elliott sent a letter saying they were not going to sign a LS-33, but there was no problem or objection.[54] The absence of objection, following the discussion about the agreement, indicated approval by Liberty Mutual. Mr. Soileau spoke directly with Mr. Elliott and the writings are consistent with that. There is no signed LS-33 because there was no settlement. There was no settlement because there was no longer any case. Because the case was dismissed, Mr. Lane could have called and refused to give Claimant the $50,000 and the case would have still been gone.

Even though Mr. Elliott told Mr. Soileau that Liberty Mutual was uncomfortable with signing the LS-33, Mr. Soileau still went forward with the disbursement of the funds to Claimant because of Mr. Elliott's assurances to Mr. Soileau that there was not a problem. When he got Mr. Elliott's letter of 19 May 03, Mr. Soileau did not write a response because he took Mr. Elliott at his word. Although the letter said Liberty Mutual did not approve the settlement, there was no settlement because the case had been dismissed. Mr. Soileau understood that Liberty Mutual would not do a LS-33. Mr. Soileau also understood from his discussions with Mr. Elliott that everyone was on the same page.

Mr. Elliott wanted to do a lump sum settlement; he did not want to do a LS-33. His position was that they did not need a LS-33 and that they should sit down and get the longshore case resolved. That was absolutely consistent with the position Mr. Soileau had taken with Mr. Lane, based on Mr. Soileau's research. He had stated that much in his letter to Liberty Mutual. Mr. Elliott's position was that they were not going to do a LS-33 and there was no third-party claim. Mr. Soileau expressed his concerns and told Mr. Elliott that he wanted to make sure everyone understood what was going on. Liberty Mutual never said Claimant had a good 905(b) cause of action or could sue anyone.

[56] EX-11.
[54] EX-23.

In short, Mr. Soileau had oral discussions with Mr. Elliott, in which Mr. Elliott specifically told Mr. Soileau they did not need to worry about a LS-33, but should try to do one global settlement of the longshore claim. Once Patton-Tully was out of the way and satisfied, they were going to try to lump sum the longshore claim. At that point, Mr. Soileau brought on Mr. Zimmerman for the longshore aspect of the case.

While they discussed that there was no third-party, it was not discussed in the context of Patton-Tully Salvage, Patton-Tully Transportation, etc. All sides and all documents just called it Patton-Tully, as an all-inclusive term. Mr. Soileau understood that three different entities existed and were listed in the complaint filed in Claimant's Jones Act case. Mr. Lane agreed with Mr. Soileau that there was no third-party issue.

Part of the consideration, in exchange for the $50,000, was a release of Claimant's rights under general maritime law, 905(b), and the Disabilities Act. Mr. Soileau did not believe Claimant had any rights to waive under those provisions, but that is what Patton-Tully wanted.

Mr. Soileau does not think that he malpracticed by failing to get written approval of the settlement. He does not think there was a settlement and does not think a LS-33 was required. However, if the Court determines that Mr. Elliott did put Mr. Soileau in a "bog hole," then that is probably malpractice. Mr. Soileau has not researched the matter, but would definitely not do it that way again, especially if he had to deal with Mr. Elliott. If it turns out that this trap was built and sprung by Mr. Elliott and caught Mr. Soileau, then that is malpractice. Mr. Soileau should not have trusted Mr. Elliott and should have seen it coming. If Claimant loses his benefits, Mr. Soileau is going to have to go to Claimant because that should never have happened.

ANALYSIS

Under Section 33(g)(2), Claimant forfeited his rights to compensation and medical benefits if: (1) he was a person entitled to compensation under the Act for his accident on the YOCONA; (2) he entered into a settlement with a third person who is liable in damages on account of that accident; (3) the settlement was for an amount less than what he is entitled to under the Act; and (4) he did not obtain written approval from his employer and the carrier prior to the settlement.

A Person Entitled To Compensation

The parties stipulated and there is no dispute that Claimant was a person entitled to compensation under the Act as a consequence of his 3 Apr 01 accident onboard the M/V YOCONA.

A Settlement With A Third Party Liable For Damages

A SETTLEMENT / LIABLE FOR DAMAGES

Claimant suggests that since he had no cognizable cause of action under anything but the Act, his release and waiver of any other claims was not a settlement, but rather an acknowledgement of that fact. Consequently, he did not settle any claims upon which Employer or Carrier might have been able to seek derivative compensation from a third-party. Claimant essentially asks the court to find that there was no basis for any Jones Act, Section 905(b), general maritime, or Disability Act causes of action.

Such an invitation is contrary to the case law cited above and inconsistent with the Claimant's own actions. Claimant did not dismiss the Jones Act case on his own motion because it was unethical to prosecute it. He waited until he had some assurance that the dismissal was part of an agreement that included $50,000. The release and acknowledgement specifically calls for the dismissal of the state court case in exchange for valuable consideration.

While Claimant may have believed that there was no merit to any potential Section 905(b), general maritime, or Disability Act causes of action, Patton Tully was concerned enough about them to demand they be included in the agreement.

Consequently, I find that there was a settlement with a party, at least potentially liable in damages, for the same injury covered by the Longshore claim.

A THIRD PARTY

The named defendants in the Jones Act complaint and dismissal were Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; and Patton-Tully Salvage Services, LLC. The release and acknowledgement released Patton-Tully Transportation, LLC; Patton-Tully Transportation Company; Patton-Tully Salvage Services, LLC; its protection and indemnity underwriters, including The Center Marine Managers, Inc.; and the M/V YOCONA. The relevant question is whether any of those named parties was a third person, *i.e.*, not the employer or its longshore carrier.

The testimony was clear that Claimant understood that at the time of the accident he worked for "the salvage services division" of Patton-Tully, Patton-Tully Salvage Services, LLC. His pay records were maintained by Patton-Tully Salvage Services, LLC, even though his checks may have been drawn from a joint account. His supervisor was part of Patton-Tully Salvage Services, LLC, and he reported his injury to Patton-Tully Salvage Services, LLC. The niceties of corporate structure were understandably of no great moment to Claimant and in fact, all parties in this case referred to Patton-Tully or the various entities thereof in general terms.

It is clear that the various Patton-Tully entities were highly intertwined in their relationships and may have used common bank accounts, shared administrative costs, and been covered by a single insurance contract. However, the evidence shows that they complied with corporate formalities and Claimant has failed to demonstrate frustration of contractual expectations, flagrant disregard of corporate formalities, fraud, or other equivalent misfeasance.[55] Consequently, I find that there was not a unity of all named Patton-Tully entities released by Claimant.

Were that not the case, the M/V YOCONA, even if it was owned by Claimant's employer, would still constitute a third-party if released under Section 905(b).

Therefore, I find that Claimant entered into a settlement with a third-party liable for damages.

An Amount Less Than His Entitlement Under The Act

Claimant has been paid over $100,000 in benefits under the Act. He received $50,000 in exchange for executing the consent dismissal and release and acknowledgment.

Claimant argues that since he reserved his longshore rights in those documents he actually received $50,000, plus his longshore entitlement. Therefore, he could not have settled for an amount less than what he was entitled to under the Act. However, Section 33(g) is part of the Act and if Claimant simply reserved his rights under the Act, those rights would be subject to forfeiture. In that instance, he would not be entitled to benefits and the settlement amount would be less than what he would have been otherwise entitled to under the Act.

If, on the other hand, Claimant is suggesting that the reservation of longshore rights implicitly waived Section 33(g) and he remained entitled to his longshore benefits, he is essentially arguing that he obtained approval. That issue is addressed *infra*.

Whether characterized as a settlement or not, Claimant received $50,000 in exchange for dismissing the Jones act case and waiving his 905(b) and general maritime rights for less than his entitlements under the Act.

I find that Claimant entered into a settlement with a third-party liable for damages for an amount less than his entitlement under the Act.

Without Obtaining Written Approval Prior To The Settlement

No LS-33 was ever signed in this case and there is no serious suggestion that a single, formal, written approval of any type was obtained from Liberty Mutual. Instead, Claimant argues that Employer and Carrier were involved in the settlement negotiations and no additional writing was required.

[57] While the burden of proof as to the §33(g) issue in general lies on Employer/Carrier, Claimant bears the burden related to disregarding corporate structure. Nonetheless, even if that burden would fall on Employer/Carrier, my findings would remain the same.

APPROVAL BY EMPLOYER

According to Patton-Tully Transportation, LLC's general manager, the $50,000 settlement check was drawn on an account that was setup for all the entities of Patton-Tully and had Patton-Tully Transportation Company as the name on the account. Mr. Lane had the authority of the three named Patton-Tully entities and the P & I carrier to draft the release. The evidence establishes that Employer was directly involved in and approved of the terms of the settlement, although that participation is not reflected in a single signed document.

APPROVAL BY LIBERTY MUTUAL

Mr. Lane specifically denied that he represented Liberty Mutual or could approve any settlement on its behalf. Mr. Elliott, on the other hand, clearly represented Liberty Mutual. Accordingly, the analysis turns to the negotiations and communications Mr. Soileau engaged in with Liberty Mutual's adjuster and Mr. Elliott.

In that regard, I note that based on his demeanor in court, I found Mr. Soileau to be a generally credible and candid witness. I found his testimony to be corroborated by the weight of the evidence in the case. Moreover, I note that Mr. Elliott was the only other party to many of the relevant discussions Mr. Soileau described. Mr. Elliott could have elected to disqualify himself as counsel and testify. In fact, at one point during discovery Claimant moved to disqualify Mr. Elliott for that very purpose.[56]

On the other hand, I gave Becky Combs' testimony less weight. She was not personally involved in the case at most relevant times. Moreover, her suggestion that Liberty Mutual continued to pay extended benefits in order to continue its investigation and attempt to perfect possible defenses to a claim that was likely totally barred is inconsistent with her own observation that she would have stopped payments sooner.

I find that the evidence shows in relevant part:

> When approached by Mr. Soileau and informed of the terms of the proposed settlement, Mr. Elliott was not certain that a third-party was involved. Given what appeared to be Employer's involvement in the settlement, he was more concerned with Liberty Mutual's ultimate costs, rather than Patton-Tully's possible non-longshore liability. In the course of their discussions, Mr. Elliott led Mr. Soileau to believe that once Patton-Tully was out of the case, Liberty Mutual was more interested in reaching a lump sum settlement of the longshore claim than obtaining a signed LS-33 releasing any third parties regarding non-longshore claims. Consequently, Mr. Soileau proceeded to execute the release. In an effort to keep its options open, Liberty Mutual ultimately told Claimant that it did not approve of the settlement but asked to be informed when it was concluded.

[58] He withdrew that motion.

> Indeed, Liberty Mutual's actions in reinstating and continuing Claimant benefits were consistent with Mr. Soileau's understanding. It reinstated benefits with the consent dismissal. *Mapp* was released in June of 2004, clarifying that active involvement of an employer was not sufficient to obviate the need for the longshore carriers' written approval of a third party settlement. Liberty Mutual ceased benefit payments shortly thereafter.

In spite of those findings the fact remains that Liberty Mutual did not sign any written settlement approval or take an active role in any settlement negotiation. Mr. Elliott was apprised of those terms and simply informed Claimant that Liberty Mutual did not approve, but was not demanding a LS-33.

Mr. Elliott's actions on behalf of Liberty Mutual were insufficient to overcome the stringent statutory requirement for written approval.

In light of the harsh result of that finding, I have considered whether in such circumstances, the law affords any equitable relief. Before addressing the question of whether equitable estoppel applies in general to Section 33 issues, I find that Liberty Mutual took a position (that there was no third party and a LS-33 was not required) inconsistent with that which it takes now. I also find that Claimant relied in good faith upon that position. However, I do not find that Mr. Elliott knew the facts and Claimant did not. They based their assessments of whether there was a third party or a LS-33 was required on the same information. Mr. Soileau believed that Liberty Mutual would stand by its initial assessment and representation that a LS-33 was not necessary and elected to proceed without one.[57] The fact that circumstances subsequently changed and Liberty Mutual decided to invoke its defense under Section 33(g) would not constitute grounds for estoppel. However, even if that were not the case, the law appears be clear that equitable estoppel is inapplicable in cases involving the clear language of Section 33(g).

[57] Claimant could argue that the "fact" Carrier knew, but he did not know, was "the fact" that Carrier would not assert the requirement for a LS-33. However, that is an intention rather than a fact. Moreover, it appears, based on Carrier's actions at the time, to have been a true statement of its intent, at least until *Mapp* was decided.

CONCLUSION

Accordingly, I find the evidence establishes that (1) Claimant was a person entitled to compensation under the Act for his accident on the YOCONA ; (2) Claimant entered into a settlement with a third person who is liable in damages on account of that accident; (3) the settlement was for an amount less than what he is entitled to under the Act; and (4) Claimant did not obtain written approval from the carrier prior to the settlement.

ORDER

The claim is dismissed.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge